

**Parc Fifty One Associates, d/b/a Parc Fifty One Hotel and Jose Rodriguez.** Case 2-CA-24310

March 31, 1992

**DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT  
AND RAUDABAUGH

On September 30, 1991, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The General Counsel filed exceptions and a supporting brief and the Respondent filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt his recommended Order for the reasons set forth below.

1. The judge found that Personnel Manager Schaefer violated Section 8(a)(1) by telling security guard Carmine Feola on April 12, 1990,<sup>2</sup> to inform security guard Jose Rodriguez that such "vote for the Union" comments as Rodriguez had just made to unit employee Rogers would lead to Rodriguez' termination. The judge noted that the Respondent and the Union had entered into a preelection neutrality agreement, in which the Respondent agreed *inter alia* not to express any opinion for or against the Union. He concluded that although such neutrality agreements may be commendable they cannot negate employees' exercise of their Section 7 rights; and it is immaterial whether the employees exercising those rights are in or out of the unit sought. Thus, Schaefer's threat to discharge Rodriguez, a guard but nevertheless an employee, for purportedly breaching the neutrality agreement, unlawfully interfered with Rodriguez' Section 7 rights, in violation of Section 8(a)(1).

2. The judge dismissed 8(a)(3) and (1) allegations arising out of General Manager Gaumert's discharge of Rodriguez on April 12 for the asserted reason that Rodriguez' above-quoted statement to Rogers violated the neutrality agreement. The judge found, based on credited testimony, that a few minutes before Rodriguez' actual discharge Schaefer and Resident Manager Reijmers each independently had decided to discharge Rodriguez for his insubordinate conduct un-

related to any Section 7 activity. Thus, he found that, notwithstanding Gaumert's asserted unlawful reason, Rodriguez would have been discharged even without his protected activity. The General Counsel has accepted to these findings. We affirm.

On April 9 Reijmers mailed to Rodriguez a letter which included a final disciplinary warning. The April 9 letter followed a number of separate incidents involving Rodriguez' open disregard for managerial authority. Thus, on March 28, Rodriguez left his security post to take a break after being instructed not to do so by the night manager. Reijmers and Schaefer orally warned Rodriguez on March 30 that further violations would be grounds for disciplinary action. A few days later, Rodriguez appended the following signed note to Reijmers' posted memo describing proper telephone etiquette for security guards: "[P]LEASE REMEMBER THAT THIS INSTRUCTIONS [sic] ARE VERY IMPORTANT TO MR. REIJMERS. SECURITY TASKS ARE SECONDARY." When Reijmers saw the notation he became outraged and upset, discussed the incident with Schaefer, and wrote to Rodriguez on April 9, as follows:

Following your signed message notifying your colleagues of your disregard for the requests of senior management, you are issued with this final warning for misconduct and insubordination.

Should there be further reports of this or similar types of behavior, you will bring upon yourself more severe disciplinary action which may include suspension or termination.

On April 12, while at home on vacation, Rodriguez received the April 9 letter. He immediately telephoned Reijmers for an explanation and was invited by the latter to meet with him that day. At the April 12 meeting with Reijmers, which was also attended by Schaefer and two other security guards, Rodriguez waved the letter in Reijmers' face while loudly demanding an explanation for the final warning and denying that he had received any prior discipline. He demanded that Reijmers define misconduct and insubordination; and while again waving the letter at Reijmers, he stated, "Man, you are stupid." At that point Schaefer terminated the meeting and instructed the two security guards to escort Rodriguez out of the facility.<sup>3</sup> Both Schaefer and Reijmers, according to their credited testimony, decided at that time that Rodriguez had to be terminated, although their testimony acknowledges that neither told the other of his or her decision.

Immediately thereafter, Schaefer and Reijmers met Gaumert on their way to a meeting at which the neutrality agreement was to be explained to the security

<sup>1</sup> The General Counsel has impliedly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> All dates refer to 1990.

<sup>3</sup> April 13 memoranda by Schaefer and Reijmers describe Rodriguez' insubordinate conduct at the meeting and his being ordered off the premises because of his conduct.

guards. Schaefer told Gaumert about Rodriguez' "vote for the Union" remark but not about his insubordinate conduct to Reijmers. A few moments later, Gaumert saw Rodriguez and escorted him outside the building where, in the presence of Schaefer and Reijmers, he discharged Rodriguez for violating the neutrality agreement.

As noted previously, the judge found that despite Gaumert's expressed reason for discharging Rodriguez, the prior decisions of Schaefer and Reijmers to discharge him for insubordinate conduct met the Respondent's *Wright Line*<sup>4</sup> burden by proving that Rodriguez would have been discharged in any event for reasons unrelated to his Section 7 activity.

The General Counsel's exceptions argue that *Wright Line* is applicable only to dual-motive cases in which there is evidence of both a lawful and an unlawful reason for the discharge at the time of the discharge. The General Counsel contends that Gaumert's explicit statement to Rodriguez reveals that the one and only reason for discharging him was his violation of the neutrality agreement. The General Counsel asserts that there is no evidentiary basis for concluding that Rodriguez would have been discharged even in the absence of his protected activity, because the evidence shows that prior to the discharge Gaumert was informed about Rodriguez' remark to Rogers but not about his insubordinate conduct in the meeting. Furthermore, Schaefer and Reijmers neither revealed their personal decisions to discharge Rodriguez to one another, nor issued a written termination notice to him—an omission which was contrary to the Respondent's established disciplinary policy. Thus, the General Counsel contends the judge's dismissal is predicated on mere speculation that the Respondent would have lawfully discharged Rodriguez sometime after his discharge by Gaumert.

Contrary to the General Counsel, we conclude that this is a case of dual motivation insofar as the credited testimony of Schaefer and Reijmers establish that there was an actual, lawful decision to terminate Rodriguez for insubordination unrelated to Section 7 activity prior to the time of his discharge. Accordingly, this is not a case of post hoc rationalization, as the General Counsel suggests.

There is ample evidence lending support, as well as plausibility, to the judge's finding that Schaefer and Reijmers made a prior decision to discharge Rodriguez for insubordination. Thus, evidence of the following provides a concrete evidentiary basis for Schaefer's and Reijmers' claims that each of them at that time made the decision to discharge him: Rodriguez' pattern of open, insolent conduct towards management, including his insulting behavior at the April 12 meeting towards Reijmers in front of fellow employees even

while protesting a final disciplinary warning; the Respondent's documented, unsuccessful attempts to restrain Rodriguez; and Schaefer's instantaneous action of terminating the meeting and having Rodriguez removed from the premises on his calling Reijmers stupid. Before either Schaefer or Reijmers could act on the decision, however, or even apprise their superior, Gaumert, of Rodriguez' insubordinate conduct, and their consequent discharge decisions, Gaumert abruptly intervened to discharge Rodriguez for violating the neutrality agreement. Hence, Gaumert's precipitate discharge of Rodriguez *explains* their failure to terminate Rodriguez, rather than negating the fact that they, independent of any decision and action of Gaumert, and independently of each other, had already decided to discharge Rodriguez for insubordination.

Nor is there reason to doubt that they would have discharged Rodriguez had Gaumert not done so. Their action in ordering Rodriguez ushered off the premises before Gaumert intervened,<sup>5</sup> indicates that they had informally set the discharge process in motion; and the reason that they did not thereafter initiate the formal procedures of that process is readily apparent. Once Gaumert had acted, no purpose would have been served for Schaefer or Reijmers to commence such discharge procedures against Rodriguez, let alone inform him of their respective decisions to discharge him. Consequently, the fact that Schaefer's and Reijmers' lawful discharge decisions were never implemented does not detract from the judge's finding that those decisions had been made and had come into existence before Gaumert discharged Rodriguez. Thus, under *Wright Line*, the fact of those previous discharge decisions, unrelated as they were to Rodriguez' protected activity, is sufficient to rebut the prima facie case that was established by the unlawful reason asserted by Gaumert. We accordingly adopt the judge's dismissal of the unlawful discharge allegations.<sup>6</sup>

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Parc Fifty One Associates, d/b/a Parc Fifty One Hotel, New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>5</sup> Although it was Schaefer who gave the order to have Rodriguez removed, Reijmers, by not objecting, signaled his approval of that order.

<sup>6</sup> We disavow the judge's finding that the execution of a settlement agreement by the Respondent's predecessor in an earlier unfair labor practice proceeding evidences the Respondent's lack of union animus.

<sup>4</sup> *Wright Line*, 251 NLRB 1083 (1980).

*Laura Sacks, Esq.*, for the General Counsel.  
*Dorothy Rosensweig, Esq.* and *Thomas Bianco, Esq. (Kaufman, Naness, Schneider and Rosensweig, P.C.)*, for the Respondent.

## DECISION

### STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on July 15 and 16, 1991, in New York, New York. The complaint and notice of hearing, which issued on June 20, 1990,<sup>1</sup> and was based on an unfair labor practice charge filed on April 17 by Jose Rodriguez, an individual, alleges that Parc Fifty One Associates, d/b/a Parc Fifty One Hotel (the Respondent) discharged Rodriguez on or about April 12, in retaliation for his activities on behalf of Local 6, Hotel Employees and Restaurant Employees Union, AFL-CIO (the Union), in violation of Section 8(a)(1) and (3) of the Act. During the hearing, counsel for the General Counsel amended the complaint to also allege that Respondent, by Lorraine Beatty Schaefer, its director of human resources, advised its employees that fellow employees who support the Union would be discharged, in violation of Section 8(a)(1) of the Act.

On the entire record, including the briefs received and my observation of the witnesses, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

Respondent, a New York corporation with its facility located in New York, New York, is engaged in the operation of a hotel providing food and lodging to the public. Annually Respondent derives gross revenue in excess of \$500,000 and purchases and receives at its facility goods and supplies valued in excess of \$5000 directly from firms located outside the State of New York. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that the Union, a constituent of the New York Hotel and Motel Trades Council, AFL-CIO (the Council), is a labor organization within the meaning of Section 2(5) of the Act.

#### III. THE FACTS

The facility involved is a large hotel located in midtown Manhattan. Rodriguez was employed there as a security guard from October 1988 until April 12, 1989, when he was terminated. He worked the 11 p.m. to 7 a.m. shift.

On July 27, 1989, the Council filed a petition to represent all Respondent's employees at the facility, excluding guards and supervisory and managerial employees. On April 9, the parties entered into an election agreement specifying the unit (security employees were excluded) and providing that the election would be conducted on April 19. The Regional Director approved this agreement. In addition, on April 9, the

Council and Respondent executed a "neutrality agreement." This agreement provided that the Union would be permitted to use Respondent's employees' cafeteria during certain hours to speak to the employees. The agreement also states:

The Hotel specifically agrees that its supervisory employees, agents and/or representatives will not act or make any statements that will directly or indirectly imply the Hotel's opinion as to whether or not the employees should support the Union or as to the reputation of the Union

The agreement provided that either party could file for arbitration of an alleged violation of this agreement. In addition, on April 9, Respondent and the Union executed a proposed collective-bargaining agreement "in the event the union is ultimately certified by the National Labor Relations Board." During the week of April 9, Respondent distributed instructions to all its management and exempt employees explaining the neutrality agreement. Basically, it provided that they were not to initiate any conversation with a unit employee regarding the Union, and were not to express any personal opinions for or against the Union. The Union won the election by a substantial majority and was certified on April 27.

Rodriguez was terminated by Respondent on April 12; he testified that prior to that day he had never been disciplined, reprimanded, or given any warnings by Respondent. Respondent's witnesses testified differently to the events leading to April 12. Leo Reijmers, who, at the time, was the resident manager and acting director of security for Respondent (he left Respondent's employ in December) and Schaefer, Respondent's personnel director, testified to a number of problems that they had with Rodriguez prior to April 12. Reijmers testified that Respondent's night manager, Kate Fallon, no longer employed by Respondent, informed him on about March 8, that on that evening the singing group New Kids on the Block was staying at the hotel. Because of this, she asked Rodriguez not to take his break, but to remain in the lobby so that they would be able to maintain proper security. Instead, he took his break and left his post. Reijmers testified that on March 30, he and Schaefer met with Rodriguez; he told him that Respondent had the right to postpone or cancel breaks when necessitated by security requirements. He also told him that if similar violations should occur, it would be grounds for disciplinary action. After disputing the allegations, Rodriguez said that he would cooperate. Schaefer testified about this meeting in a similar manner. She testified that when they first informed Rodriguez about Fallon's complaint, he said that he had a right to take the break and would take it unless he was going to be paid for the time. She said that if he worked during his break he would be paid for the time, but he did not have the authority to overrule his supervisor's instructions. Subsequently, "he got very agreeable." A memo that Reijmers and Schaefer prepared about this meeting states that the night manager must be consulted about breaks and: "Management reserves the right to postpone or delay a break in case of emergency or when necessary for other reasons."

Reijmers and Schaefer testified that the next incident involving Rodriguez involved a memo that Reijmers placed on the bulletin board a few days after the March 30 meeting. The note stated: "PHONE ETIQUETTE. THANK YOU

<sup>1</sup> Unless indicated otherwise, all dates referred to relate to the year 1990.

FOR CALLING. SECURITY; SANTIAGO, HERNANDEZ ROMAN ETC. MAY I HELP YOU!" Reijmers testified that he posted such a memo in each department of the facility so that there would be a consistent and correct method of answering the phones for the different departments at the facility. A few days after posting it, Reijmers saw that the memo at the security department phone had written in red pen alongside the memo: "NOTE: TO ALL OFFICERS, PLEASE REMEMBER THAT THIS INSTRUCTIONS [sic] ARE VERY IMPORTANT TO MR. REIJMERS. SECURITY TASKS ARE SECONDARY." It was signed "Jose."<sup>2</sup> Reijmers testified that when he saw what Rodriguez had written on his memo he was "outraged and upset," especially since this was related to what he had told him at their meeting about a week earlier. He discussed this incident with Schaefer and they decided that they would give Rodriguez a final warning, which took the form of a letter to him dated April 9, which stated:

Following your signed message notifying your colleagues of your disregard for the requests of senior management, you are issued with this final warning for misconduct and insubordination.

Should there be further reports of this or similar types of behavior, you will bring upon yourself more severe disciplinary action which may include suspension or termination.

Should you require clarification, please do not hesitate to contact me.

Schaefer testified that Reijmer was "furious" when he showed her the memo that Rodriguez had written on. They discussed what action they should take, and it was decided that because Rodriguez' action was meant to embarrass Reijmers, and since the incident occurred so soon after the March 30 meeting with him, a final warning was appropriate and the above letter was sent.

As previously stated, Rodriguez testified that he was never reprimanded or criticized by management. However, he testified that he attended a meeting at the end of March with Reijmers and Schaefer, but the meeting related to some letters that he had written. He testified that at this meeting the subject of any alleged insubordination of Fallon's orders was never discussed, but when asked whether there was an incident on March 28 where he disobeyed Fallon's instructions to remain on duty, he testified: "Not that I can remember."

Rodriguez received this letter on April 12; at the time he was on vacation which began April 9. He first called Rolando Santiago, his supervisor, who told him that he didn't know about the letter and suggested that he call

Reijmer, which he did. He asked Reijmer to clarify what he meant by the letter. Reijmer told him that if he wanted clarification he would have to come to the facility and talk to him about it. Rodriguez then went to the facility, reported to the security entrance and was told by Santiago to come to his office, which is across the hall from Schaefer's office, which he did. Reijmers testified that when Rodriguez called him on April 12 demanding an explanation of the April 9 letter, Reijmers told him that he was not going to discuss it over the phone, but that if he wanted to discuss it he would arrange a meeting; however, he had no idea that Rodriguez would arrive within the hour. Shortly thereafter, Santiago told him that Rodriguez was in his office waiting to see Reijmers. Reijmers located Schaefer in the facility and they decided that they would meet with Rodriguez.

Carmine Feola was employed by Respondent from August 1989 through April 1991; he began as a security officer and was promoted to security supervisor in May. He testified that Rodriguez arrived at the facility at about 2 p.m. on April 12; he told Feola that he had an appointment to speak to Reijmers about a letter that he had received. He took Rodriguez to Schaefer's office and was told by Schaefer to wait in the hallway outside her office. While they were waiting in the hallway, Patrick Rogers, a housekeeping employee of Respondent (a classification included in the unit) walked by and Rodriguez said to him either "Vote union" or "Don't vote union." (Feola's testimony was very confused on this area, but as all the other witnesses testified that Rodriguez said: "Vote union," I find that is what was said.) Rogers did not respond. Schaefer then told Feola to tell Rodriguez that if he mentioned another word about the Union he would be immediately terminated; Feola then told Rodriguez what Schaefer said. He, Rodriguez, Santiago, Reijmers, and Schaefer all went into Schaefer's office, admittedly, a small office.

Rodriguez testified that when he got to the security office in the basement of the cafeteria, Santiago told him that Reijmers was having lunch in the employees' cafeteria, and they walked there. Rodriguez saw Reijmers eating in the cafeteria, and "within a close distance" he saw some employees and representatives of the Union. Rodriguez shook hands with one of the union representatives and said: "These people need a union here." (In an affidavit that Rodriguez gave to the Board a few days after his termination, he stated that other than the introductions, he did not discuss anything with them.) Reijmers "was having lunch and I didn't want to interrupt him" so he and Santiago returned to the security office to wait for Reijmers. Rodriguez testified further that while they were waiting between the security office and the personnel office for Reijmers to arrive, Rogers walked by. He said to Rogers: "Vote for the Union." Rogers continued walking without commenting. Schaefer then called Feola into her office and a few moments later Feola came out and said that Schaefer said that if he made any other comment concerning the Union he would be immediately terminated.

Schaefer testified that the first she learned that there would be a meeting with Rodriguez that day was at about 2 p.m., while she was having lunch in the cafeteria, Reijmers came in and told her that Rodriguez had come to the facility to talk about the letter that he had sent him. She and Reijmers went to her office and saw Rodriguez, Feola, and Santiago standing outside the security office; she invited them all into

<sup>2</sup>In this regard, Rodriguez wrote the following entry in the security logbook on April 7:

MR. REIJMERS CALLED CONCERNING THE PROPER ETIQUETTE IN ANSWERING PHONE. HE SEEN [sic] TO BE MORE CONCERN ON THE PROPER RESPONSE OVER THE PHONE THAN TO PROVIDE THE PROPER SECURITY TO HOTEL GUESTS AND EMPLOYEES. HE ALSO MADE A PHONY REMARK: OH SO THE HERNANDEZ & RODRIGUEZ TEAM IS ON; IN A VERY SARCASTIC WAY. MR. REIJMERS, PLEASE BE CAREFUL WITH YOUR COMMENTS. MR. SANTIAGO, PLEASE ADVISE MR. REIJMERS NOT TO MAKE ANYMORE SMART RESPONSES TO ME, ESPECIALLY IN A DISCRIMINATORY MANNER.

her office. The first thing that occurred was Rodriguez began waving the April 12 letter in front of Reijmer's face demanding an explanation, saying how could he get a final warning with no prior warnings. As Reijmers attempted to answer, Rodriguez got louder and more excited and did not give him an opportunity to answer, but continued to wave the letter in his face. At that point, Schaefer's phone rang; she wanted to take the call so she asked everyone to step outside while she spoke on the phone, and they did so. As they were leaving, Rogers walked by the office and Rodriguez shouted to him: "Hey man, vote for the Union." Schaefer then said to Feola that he should tell Rodriguez that he was not to make comments like that; "Tell him that disciplinary action will be taken if he says that sort of stuff. It could lead up to termination, it is very serious, so please make sure he understands." After Schaefer completed her phone call everyone returned to her office; she and Reijmers said that they had listened to what Rodriguez had to say and asked to be given an opportunity to answer. Reijmers attempted to answer Rodriguez' questions, but Rodriguez "started going nuts again, started going crazy and he stepped forward . . . demanding an explanation. And again, it couldn't really be answered." Whenever Reijmers attempted to answer, Rodriguez shook the April 9 letter in front of his face talking about the logbook maintained at the facility and other subjects. While shaking the letter in front of Reijmer's face, Rodriguez said: "Man, you are stupid." At that point, Schaefer said that the meeting was over, there was nothing further to discuss. She told Feola to make sure that Rodriguez left the facility. Rodriguez, Feola, and Santiago then left her office.

Reijmers testified that after all five were present in Schaefer's office, Rodriguez, who was very close in proximity to him, pointed the April 9 letter at him and, in a loud voice, wanted to know what was the story with the letter and why it was a final warning. Reijmers said that it was a final warning because his insubordination had been repeated. At that point, Schaefer received a telephone call and the meeting was delayed briefly, pending completion of that call. While they were standing together waiting for the meeting to resume, Rogers walked by and Rodriguez shouted to him: "Vote union." When the meeting resumed, Schaefer told Rodriguez that if he could not act with a normal voice and a normal manner there would be no meeting. Reijmer then told him that it was a final warning because of his insubordination. Rodriguez then pointed the letter at Reijmers and said: "You're stupid; you don't know what you're doing." Schaefer then said that the meeting was over and Rodriguez, Feola and Santiago left the office.

Rodriguez testified that he began the meeting by asking Reijmer "to clarify the content of the letter." However, "I really couldn't get a straight answer to my question. He was just going around." Reijmer "mentioned" that it was due to the "little statement" that he wrote on Reijmer's telephone memo to the employees. Rodriguez testified that during this meeting he didn't raise his voice, although "it could have sounded a little bit higher than normal." At one point, while he was seated, and because he never received a satisfactory explanation from Reijmers why the letter referred to a final warning, he did "shake" the letter and said: "The contents of this letter is stupid." He testified that during this meeting he did not call Reijmers stupid, he did not scream at him,

and did not repeatedly interrupt him, although he may have interrupted him, on occasion. After he commented that the contents of the letter were stupid, Schaefer said that the meeting was over, but she did not instruct Santiago and Feola to escort him off the premises.

Feola testified that Rodriguez questioned Reijmers about the letter that he had received, but Reijmers "didn't really explain what the reason was. He had said things, but I couldn't make sense of actually what the reason was." Rodriguez said that the letter was ridiculous and "this is stupid," but he didn't swear. Rodriguez did not say that Reijmers was stupid, but that the letter was stupid. He raised his voice, but was not very loud. He does not recollect whether he was waving the letter around. Rodriguez interrupted both Reijmers and Schaefer during the meeting and on one occasion Feola asked Rodriguez to step outside the office to calm down; Schaefer also asked him to calm down during this meeting. At the conclusion of the meeting Schaefer told Feola and Santiago to escort Rodriguez out of the facility. Feola then brought Rodriguez to the service entrance of the facility; shortly thereafter he heard Horst Gaumert, then the general manager of the facility (no longer employed by Respondent) who was outside the service entrance door to the facility, telling Rodriguez: "You can't work here anymore. You're fired. Get the fuck out of here." Shortly thereafter, Gaumert told Feola that Rodriguez had been fired and told him to put an entry into the logbook to that affect and that Rodriguez would no longer be allowed on the premises. He testified that at the previously scheduled security meeting shortly after Rodriguez' discharge, Gaumert told the security employees that if they wanted to form a union, you "can get the fuck out." Respondent placed into evidence a memo signed by Reijmers, Schaefer, Santiago and Feola; it states, *inter alia*, that during the meeting with Reijmers and Schaefer, Rodriguez was raising his voice and carrying on in an argumentative manner, and Reijmers told him that it was necessary to speak in a normal voice and if he continued shouting the meeting would end. It also states that the meeting was concluded when Rodriguez told Reijmers that he was stupid and didn't know what he was doing. At that time, "Mr. Rodriguez was requested to leave the premises." Feola testified that he signed this memo because he was afraid of being fired, although he never told this to either Schaefer or Reijmers. Reijmers testified that when he gave this statement to Santiago and Feola, he told them that they could either sign it or write their own statement of what occurred at the meeting. Neither one objected to signing it as it was.

Rodriguez testified that after the meeting concluded, he and Santiago went to the service entrance to wait for a security meeting which was scheduled to begin at 3 p.m. Apparently, this meeting was to inform the security employees of the neutrality agreement with the Union. A few minutes later, Gaumert, Schaefer, and Reijmers approached him and Gaumert asked Rodriguez to step outside with them. Rodriguez said that he wanted to have Santiago with him, but Gaumert refused. Gaumert told him that he was fired for violation of the union agreement, and "Get the fuck out of here, I don't want to see you around." He left shortly thereafter. In the affidavit Rodriguez gave to the Board shortly after his discharge, he did not refer to any profanity.

Reijmers testified that when Rodriguez, Santiago, and Feola left the office, he and Schaefer "sat down and looked

at each other and couldn't believe what took place." He testified: "As far as I was concerned Mr. Rodriguez was terminated for insubordination." He testified:

Because he openly on two occasions put me, first in writing, disobeying my immediate instructions and then he displayed the same behavior in person in front of other staff members, saying that I'm stupid and that I don't know what I'm doing. As a manager of a hotel in order to operate a hotel, you're not going to have anybody on your staff who treats management like that.

He and Schaefer went upstairs where they met Gaumert and informed him of what had just occurred in the basement offices. They saw Rodriguez at the service entrance door and Gaumert asked him to step outside with them. He did so and Gaumert told him: "You're fired because you broke the neutrality agreement." There was no profanity and Rodriguez left.

Schaefer testified that "immediately after the meeting was over" she decided that Rodriguez had to be terminated. She testified:

We were in an office the size of your average building elevator and there was a desk and a filing cabinet in there. There were five of us in there. And he was going nuts and I was terrified. Leo [Reijmers] I know was scared and shocked and for this person to be securing our hotel was lunacy. There was no way it could continue.

She and Reijmers sat down in her office; "I think that we were both a bit glazed. And we didn't quite know what had happened." They walked out of her office and met Gaumert; Reijmers spoke to Gaumert, but Schaefer didn't hear what was said because she was locking her office. They headed toward the elevator to go to the security meeting and Schaefer told Gaumert that since he was going to be discussing the neutrality agreement at the meeting, "you may want to highlight the fact that this happened just a few minutes ago." She then told Gaumert what Rodriguez had yelled to Rogers in the basement; "and Mr. Gaumert was not happy about it." When they got upstairs, they saw Rodriguez and Gaumert asked him to step outside. When they were outside, Gaumert told him: "Jose, your position has been terminated for breach of the neutrality agreement." He did not use any profanity and Rodriguez left.<sup>3</sup> In reply to Rodriguez' claim for unemployment, Schaefer stated in a form dated May 19 that he was fired for "Insubordination to senior management during meeting."

#### IV. ANALYSIS

The principal issue is, of course, whether Rodriguez' termination violates Section 8(a)(1) and (3) of the Act. Additionally, at the hearing, General Counsel amended the complaint to allege that Schaefer's statement to Rodriguez, warning him about further statements such as the one he made

to Rogers, could result in discipline or termination. The secondary issue is whether this violates Section 8(a)(1) of the Act. In making these determinations, it is first necessary to make credibility findings. I have little difficulty in totally crediting the testimony of Schaefer, whom I found to be an open, honest, and direct witness who left no doubt in my mind that she was testifying in an honest and truthful manner. I also found Reijmers to be a credible witness who testified in a believable manner. He was no longer employed by Respondent and had no incentive to lie, other than, possibly, a continuing dislike for Rodriguez caused by his actions at the April 12 meeting and marking up Reijmers telephone memo a few days earlier. I also have little difficulty in discrediting much of Rodriguez' testimony; he was argumentative, evasive, and appeared to often be tailoring his testimony to best suit his purpose. Feola, who was no longer employed by Respondent and might therefore be considered a credible witness, clearly had a faulty memory and was, at times, evasive and is therefore not credited when his testimony conflicts with Schaefer or Reijmers.

I therefore find that, after Rodriguez told Rogers to vote union, Schaefer told Feola to tell Rodriguez "that we are not supposed to make comments like that," and that disciplinary action, leading up to termination, will be taken "if he says that sort of stuff." Feola testified that Schaefer told him to tell Rodriguez that if he mentions another word about the Union he would be terminated, and he did so. General Counsel alleges that this is a "hallmark violation" regardless of the neutrality agreement. Respondent alleges that this statement was not meant to and, in fact, did not interfere with employees' Section 7 rights and therefor this allegation should be dismissed. I agree with General Counsel for a number of reasons: General Counsel was not a party to the neutrality agreement. Even though such agreements may be encouraged by the Board and public policy, they do not overcome employees' Section 7 rights, especially when the employees have not been made aware of the restrictions. Therefore, even though Schaefer's statement may have been well-meaning, it was a threat to fire Rodriguez if he spoke about the Union, clearly a Section 7 right, and therefor violates Section 8(a)(1) of the Act.

As regards the 8(a)(3) allegation, counsel for General Counsel, in her brief, states: "The record is replete with evidence of Respondent's animus toward the union." Actually, I find that the opposite is true. General Counsel has two bases for this claim; the above-mentioned threat that Rodriguez would be disciplined if he again spoke of the Union and Feola's testimony that Gaumert told the security officers at the meeting following Rodriguez' discharge that if they wanted a union they could "get the fuck out." As to the former, as stated above, I find that this threat was motivated not by union animus, but by a fear of violating the neutrality agreement signed 3 days earlier. As to the latter, I generally do not credit the testimony of Feola and would not credit that this statement was made. However, even if it was made, it may have been the result of anger generated minutes earlier by the Rodriguez discharge. It certainly did not represent Respondent's position with the Union. On June 8, 1988, Region 2 of the Board issued a consolidated complaint against Respondent's predecessor and the Union alleging that the hotel had recognized and entered into a contract with the Union at a time when the Union did not represent

<sup>3</sup> Respondent attempted to introduce evidence to establish that Rodriguez was unfit for reinstatement because he stole documents from Gaumert's office during his employment with Respondent. I refused to allow such evidence on the ground that it would be more appropriate at a supplemental backpay proceeding.

an uncoerced majority of the unit employees, in violation of Section 8(a)(1), (2), and (3) and 8(b)(1)(A) and (2) of the Act. This consolidated complaint was subsequently settled.<sup>4</sup> Also relevant to the lack of animus on Respondent's part is that at the same time that it executed the neutrality agreement with the Union, on April 9, the parties executed a collective-bargaining agreement that would be effective "in the event the union is ultimately certified by the National Labor Relations Board." These are not the usual activities of an employer with animus toward a union.

General Counsel alleges next that Rodriguez was fired because he encouraged Rogers to vote for the Union; Respondent, in its brief, agrees that he was fired because of his breach of the neutrality agreement:

Jose Rodriguez was terminated on April 12, 1990, by Respondent's General Manager, Horst Gaumert because Gaumert perceived that Rodriguez had violated the neutrality agreement by making statements regarding the Union to another employee.

Further on in its brief, counsel for Respondent states:

It is undisputed that General Manager Gaumert told Rodriguez he was being discharged because he had violated the Neutrality Agreement *not* because he supported the Union. Respondent was, in fact, trying to preserve its relationship with the Union by enforcing the terms of the neutrality agreement and nothing more.

The first question therefor is whether General Counsel has sustained its initial burden under *Wright Line*, 251 NLRB 1083 (1980). Respondent defends that Rodriguez was not fired in order to discourage union activity among its employees; rather, he was fired because he violated the neutrality agreement it entered into with the Union. There are a number of problems with this defense. Principal among them is that such an agreement, while otherwise commendable, cannot bind employees and deprive them of their Section 7 rights, which is what Respondent's argument, if accepted, would do. In addition, the evidence establishes that the rules regarding this neutrality agreement were not yet conveyed to the security employees; apparently, that was the purpose of the meeting of security employees on the afternoon of April 12. Finally, it is not clear from the language of the neutrality agreement ("its supervisory employees, agents and/or representatives") whether security guards would be included within the classifications proscribed. For these reasons, I find that the neutrality agreement did not lawfully restrict Rodriguez' right to tell Rogers to vote for the Union, and I therefor reject this defense. As the evidence establishes that when Schaefer and Reijmers met Gaumert after their meeting with Rodriguez, Santiago, and Feola they only told him about what Rodriguez said to Rogers, and that Gaumert told Rodriguez that he was being fired for violating the neutrality agreement, I find that General Counsel has sustained its burden of establishing that Rodriguez' protected conduct of urg-

ing Rogers to vote for the Union was a motivating factor in his discharge.

The issue therefore is whether Respondent has sustained its burden of establishing that Rodriguez would have been discharged even if he hadn't told Rogers to vote for the Union. I find that it has. Schaefer and Reijmers both testified that at the conclusion of the meeting they decided that Rodriguez had to be fired. Schaefer testified that at the meeting, Rodriguez

was going nuts and I was terrified. Leo I know was scared and shocked and for this person to be securing our Hotel was lunacy. There was no way it could continue.

Reijmers testified in a similar manner: "as far as I was concerned Rodriguez was terminated for insubordination." His reason was that Rodriguez was warned on March 30 about not following a supervisor's order, and was given a final warning in the April 9 letter for the comments he wrote on Reijmers telephone memo. His actions at the April 12 meeting was the final straw: "you're not going to have anybody on your staff who treats management like that." Considering their shock at what had occurred at this meeting, it is surprising that they did not mention Rodriguez' insubordination when they met him on the way to the security officers' meeting. This may be explained by the fact that they were in a rush to get to the meeting and, as Schaefer testified: "I said to Mr. Gaumert in view of the fact that you are going to be talking about neutrality you may want to highlight the fact that this happened just a few minutes ago." Schaefer may have concluded that she could tell Gaumert about the insubordination at the conclusion of the meeting. However, since I credit Schaefer and Reijmers regarding Rodriguez' actions at the April 12 meeting, and credit the fact that at the conclusion of the meeting they had decided to fire him, I find that Respondent has satisfied its burden that Rodriguez would have been fired even absent his direction to Rogers, and therefor recommend that the 8(a)(1) and (3) allegation be dismissed.

#### CONCLUSIONS OF LAW

1. Parc Fifty One Associates, d/b/a Parc Fifty One Hotel is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by threatening its employees with discharge or other discipline for talking about the Union.

4. The Respondent did not violate the Act as further alleged in the complaint.

#### REMEDY

Having found that Respondent has engaged in, and is engaging in, certain unfair labor practices, I shall recommend that it cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act, principally the posting of the notice.

<sup>4</sup> At the hearing I rejected the exhibits regarding this prior action as irrelevant to the instant matter. Because counsel for General Counsel in her brief alleges animus to the Union, I reverse myself and now find that R. Exhs. 2a and 2b are relevant and shall be received in evidence.

On these findings of fact, and conclusions of law, and the entire record, I issue the following recommended<sup>5</sup>

#### ORDER

The Respondent, Parc Fifty One Associates, d/b/a Parc Fifty One Hotel, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with discharge or other discipline for talking about the Union.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act.

(a) Post at its New York, New York facility copies of the attached notice marked "Appendix."<sup>6</sup> Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by Respondent immediately upon receipt

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<sup>5</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>6</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed as to the termination of Jose Rodriguez.

#### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten our employees with discharge or other discipline for talking about Local 6, Hotel Employees and Restaurant Employees Union, AFL-CIO or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed them in Section 7 of the Act.

PARC FIFTY ONE ASSOCIATES, D/B/A PARC  
FIFTY ONE HOTEL